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In The

Supreme Court of the United States

October Term, 1995

ALAN MEGHRIG AND MARGARET MEGHRIG,
Petitioners,

vs.

KFC WESTERN, INC.,
Respondent.

On Writ of Certiorari to the United States Court of Appeals For the Ninth Circuit

BRIEF FOR THE STATE OF LOUISIANA THROUGH ITS DEPARTMENT OF TRANSPORTATION AND DEVELOPMENT AS AMICUS CURIAE IN SUPPORT OF RESPONDENT

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Costello v. United States,
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Cowart v. Wicklos Drilling Co.,
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Craig Lyle Ltd. Partnership v. Land O'Lakes, Inc.,
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Hecht Co. v. Bowles,
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Johnson v. Kay,
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KFC Western, Inc. v. Meghrig,
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Morrissey v. Bologna,
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Niecko v. EMRO Marketing Co.,
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Porter v. Warner Holding Co.,
328 U.S. 395, 66 S.Ct. 1086 (1946) 8

Gwaltney of Smithfield, Ltd. v. Chesapeake Bay Foundation, Inc.,
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United States v. Aceto Agricultural Chemicals Corp.,
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United States v. Conservation Chemical Company,
619 F.Supp. 162 (W.D. Mo. 1985) 18

United States v. Dickerson,
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United States v. Mottolo,
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United States v. Reilly Tar and Chemical Co.,
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Zands v. Nelson,
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STATUTES

Comprehensive Environmental Resource Conservation, Liability and Recovery Act of 1980,
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42 U.S.C. § 9659(h) 21

Hazardous and Solid Waste Amendments of 1984,
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Resource Conservation and Recovery Act, 42 U.S.C. § 6901, *et seq.* 2

42 U.S.C. § 6902(a)(4) 9

42 U.S.C. § 6902(b) 9

42 U.S.C. § 6921(b)(2)(A) 24

42 U.S.C. § 6921(b)(2)(B) 24

42 U.S.C. § 6972(a)(1)(B) . . . . . *passim*

42 U.S.C. § 6972(a) (1984) 6

42 U.S.C. § 6972(f) 14, 15

42 U.S.C. § 6991, *et seq.* 26

Superfund Amendment and Reauthorization Act of 1986, Pub.L. No. 99-499, 100 Stat. 1613 (1986) 17

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MISCELLANEOUS

Robert N. Aguilez, *Refining CERCLA's Petroleum Exclusion,* 7 TULANE ENV. L.J. 41, 64 (1993) 26

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27 Am Jur. 2d Equity § 2 12

27 Am Jur. 2d Equity § 23 11

27 Am Jur. 2d Equity § 86 12

27 Am Jur. 2d Equity § 87 12

27 Am Jur. 2d Equity § 104 14

27 Am Jur. 2d Equity § 119 18

27 Am Jur. 2d Equity § 120 13

27 Am Jur. 2d Equity § 121 12

27 Am Jur. 2d Equity § 123 13

James Baller, *The Petroleum Exclusion - Stronger Than Ever After* Wilshire Westwood, 43 SOUTHWESTERN L.J. 915, 918 (1990) 23

BLACK'S LAW DICTIONARY (6th ed. 1990) 7, 12

30A C.J.S. Equity § 6(c) 13

30A C.J.S. Equity § 20 12

30A C.J.S. Equity § 93 13

30A C.J.S. Equity § 94 . . . . . 11, 12

30A C.J.S. Equity § 95 11

30A C.J.S. Equity § 118 13

30A C.J.S. Equity § 119 18

30A C.J.S. Equity § 120 13

30A C.J.S. Equity § 129 17

43 C.J.S. Injunctions § 7 7

126 Cong. Rec. H11,976 (Dec. 3, 1980) 24

130 Cong. Rec. S2028 (Feb. 29, 1984) 27

S. COOKE, THE LAW OF HAZARDOUS WASTE (1995) 21

EPA, *Clarification of the Regulatory Determination for Wastes from the Exploration Development and*

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EPA, EXECUTIVE SUMMARIES, REPORT TO CONGRESS: MANAGEMENT OF WASTES FROM THE EXPLORATION, DEVELOPMENT, AND PRODUCTION OF CRUDE OIL, NATURAL GAS, AND GEOTHERMAL ENERGY, Pt. 1, p. 7 n.1 (1987) 25

EPA General Counsel, *Scope of CERCLA Petroleum Exclusion Under Sections 101(14) and 104(a)(2)* 5 (July 31, 1987) 23

50 Fed. Reg. 13,456 (April 4, 1985) 23

51 Fed. Reg. 8,206 (March 10, 1986) 23

House Conf. Rep. No. 96-1444, Joint Explanatory Statement of the Committee of Conference, *reprinted in* 1980 U.S.C.C.A.N. 5019, 5031 25

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BRIEF FOR THE STATE OF LOUISIANA THROUGH ITS DEPARTMENT OF TRANSPORTATION AND DEVELOPMENT AS AMICUS CURIAE IN SUPPORT OF RESPONDENT

INTEREST OF THE AMICUS CURIAE

The Louisiana Department of Transportation and Development ("DOTD"), an agency of the State of Louisiana charged with the construction and maintenance of highways, frequently encounters hazardous waste in the rights-of-way that it has purchased or expropriated. Typically, when such materials are discovered during highway construction, compliance with Louisiana and federal environmental laws necessitates immediate

cessation of construction, pending investigation and/or remediation of the site. When construction is stopped, DOTD is usually obligated under industry-standard highway construction contracts to pay "delay damages" to the contractors building the highways. DOTD incurs significant costs when forced to delay construction to comply with environmental laws.

Once a site is determined to contain hazardous materials, DOTD must decide whether to remediate immediately at its own expense in order to minimize the threat to human health and the environment as well as the contractual delay damages, or to permit the threat to remain unabated and to incur significantly greater delay damages by allowing the highway construction site to remain closed until the responsible parties are identified and mandated to remediate the site.

DOTD has consistently and reasonably opted in favor of the former by remediating sites as quickly as possible and then recommencing highway construction. To date, DOTD has encountered approximately forty (40) sites at which remediation costs have been incurred. DOTD estimates that it has spent tens of millions of state taxpayer funds and federal matching dollars in remediating these sites. This money would otherwise have been used to repair Louisiana's highways, complete unfinished highways, or construct new highways. DOTD cannot overemphasize the fact that it is in no way responsible for the presence of the hazardous materials at these sites. Moreover, it is suggested that the highway departments of the other forty-nine (49) states may be similarly situated with respect to environmental remediation, and that the combined financial cost to the nation's taxpayers is staggering.

DOTD is aggressively pursuing responsible parties to recover the funds that DOTD has spent on remediation of the hazardous waste it has encountered. The holding of the United States Court of Appeals for the Ninth Circuit in the present case confirms that the Resource Conservation and Recovery Act ("RCRA"), 42 U.S.C. § 6901 *et seq.*, confers upon private citizens, including government agencies, the valuable right to recover the costs of remediation from the parties who are truly

responsible for the presence of the hazardous materials. *KFC Western, Inc. v. Meghrig*, 49 F.3d 518, 521 (9th Cir. 1995).

DOTD's ability to recover these costs will be seriously jeopardized if this Honorable Court does not affirm the Ninth Circuit's holding. Louisiana is a major petroleum-producing state, with large petroleum refining and petrochemical industries. Therefore, the "petroleum exclusion" contained in the Comprehensive Environmental Response, Compensation, and Liability Act ("CERCLA"), 42 U.S.C. § 9601 *et seq.*, 42 U.S.C. § 9601(14), and Louisiana's analogous state environmental law, La. R.S. 30:2271(4)(c), may render recovery of remediation expenses at many sites difficult or impossible. Furthermore, as the Ninth Circuit noted, state "common law" remedies (which are necessarily statutory under Louisiana's civil law system), such as nuisance, trespass, negligence, and breach of warranty, are severely limited as a result of the difficulties of proof, short statutes of limitation, and the fact that the hazardous materials present at the sites were usually placed there by or with the acquiescence of the former owners of the property.

DOTD fully intends to continue to act in the best interest of the public health and the environment, but its funds are not unlimited, particularly in light of the current trend toward reducing governmental budgets. The facts of the present case involve only a party who has encountered hazardous waste in a single instance. Many entities encounter hazardous waste sites repeatedly, such as state highway departments, other government agencies, land development companies, and gas or power companies when constructing pipelines or power transmission lines. Such entities cannot fund environmental remediation indefinitely, without restitution of these funds. Precluding recovery of these funds by DOTD (and other entities that encounter hazardous waste repeatedly) will therefore ultimately thwart efforts to curtail endangerment to human health and the environment, because such entities will no longer be able to afford to remediate these sites.

Accordingly, DOTD respectfully represents to this Honorable Court that it will suffer significant losses if the opinion below is not affirmed. Specifically, DOTD will be left without an adequate state, federal, or equitable remedy for recovery of the

state and matching federal dollars that it has expended in remediating hazardous waste for which other parties should be responsible under RCRA.

SUMMARY OF ARGUMENT

The plain language of RCRA's citizen suit provision, conferring authority upon the courts to "restrain" responsible parties, to order such parties to "take such other action as may be necessary," or "both," clearly authorizes not only mandatory and prohibitory injunctive relief, but also restitutionary relief. Given RCRA's beneficial purpose of speedy remediation of hazardous waste sites presenting a threat to the public health or the environment, the "most natural" interpretation of the residual power is that it authorizes the courts to require the parties responsible for the improper disposal of hazardous waste to repay others who have remediated the contaminated sites in question. This interpretation maximizes private citizens' incentive to remediate and minimizes the delay within which remediation may be performed.

Citizens' suits under RCRA invoke the courts' traditional powers of equity, and therefore courts may order the equitable remedy of restitution pursuant to RCRA. Equity may require repayment by a person whose duty to the public has been performed by another, because equity resolves disputes in accordance with the principles of justice and fairness. Justice would be frustrated if an innocent party were forced to bear the ultimate responsibility for and cost of remediating hazardous waste properly attributable to another party. Moreover, there is no functional difference between requiring a responsible party to remediate a site, which Petitioners admit is permissible, and requiring such a person to repay another who has already remediated the site.

RCRA expressly preserves all of the citizen's suit plaintiff's rights to relief, including equitable relief. Thus, the courts' authority to order the responsible parties to take "such other action as may be necessary" includes equitable relief, and the

remedy of restitution should be available to citizen's suit plaintiffs, in the proper circumstances.

Furthermore, the "imminent and substantial endangerment" necessary to give rise to liability under RCRA's citizen's suit provision need exist only at the time remediation is undertaken, because any other interpretation would frustrate the purposes for which the citizen's suit provision was enacted.

Finally, it is irrelevant to the propriety of claims for recovery of remediation expenditures under RCRA whether recovery is also permissible under CERCLA. CERCLA does not preempt the field of remediation or recovery of remediation expenditures. RCRA and CERCLA are entirely independent statutes, and therefore, even if the leaded gasoline at issue in the present case is properly exempted from CERCLA as a result of CERCLA's petroleum exclusion, recovery of KFC's remediation expenditures under RCRA is proper because RCRA contains no such restriction.

ARGUMENT

I. SECTION 6972(A)(1)(B) OF RCRA PROVIDES PRIVATE CITIZENS WITH THE RIGHT TO RESTITUTION FROM THE RESPONSIBLE PARTIES FOR THE COSTS OF REMEDIATING HAZARDOUS WASTE.

A. Remediation Expenditures May Be Recovered Pursuant to the RCRA Citizen's Suit Provision.

RCRA, prior to its amendment in 1984, authorized private citizens to file suit only to "enforce [a] regulation or order, or to order the Administrator to perform such act or duties as the case may be." 42 U.S.C. § 6972(a) (1984). The 1984 amendments substantially broadened the scope of the citizen's suit provision by adding subsection 6972(a)(1)(b), pursuant to which a citizen may obtain a court order:

> to restrain any person who has contributed or who is contributing to the past or present handling, storage, treatment, transportation, or disposal of any solid or hazardous waste [which may present an imminent and substantial endangerment to health or the environment], to order such person to take such other action as may be necessary, or both.

Hazardous and Solid Waste Amendments of 1984, Pub.L. No. 98-616, 98 Stat. 3221 § 402, *codified at* 42 U.S.C. § 6972(a)(1)(B).

The Ninth Circuit in its opinion in the present case held that the relief contemplated by the phrase, "... such other action as may be necessary," includes restitutionary relief, such as repayment by the responsible party of the costs of remediation incurred by the citizen's suit plaintiff. *KFC*, 49 F.3d at 521. Petitioners, however, argue that RCRA's citizen's suit provision authorizes only injunctive relief, and only with respect to an "imminent endangerment" in existence at the time suit is filed. Brief for the Petitioner at 13-18, *Meghrig v. KFC Western, Inc.*,

__ U.S. __ (19__) (No. 95-83) ("Petitioners' Brief"). Petitioners' interpretation of the statute is unduly narrow, and supported by neither RCRA's language nor its purpose.

1. The Plain Language of the Citizen's Suit Provision Authorizes Restitutionary Relief.

Judicial inquiry as to the proper interpretation of a statute must end with its language when the meaning is clear. *Cowart v. Wicklos Drilling Co.*, ___ U.S. ___, 112 S.Ct. 2589, 2594 (1992). RCRA's citizen's suit provision authorizes courts to award plaintiffs three (3) forms of relief: (1) "... to restrain any person"; (2) "... to order such person to take such other action as may be necessary"; or (3) "both." 42 U.S.C. § 6972(a)(1)(B). The plain language of the statute, authorizing courts to order any action that is "necessary", logically includes the restitutionary relief sought by KFC because the definition of "necessary" is not limited by the language of the provision to injunctive relief.

The relief contemplated by the authorization "... to restrain any person" indisputably includes injunctive relief, as Petitioners concede. Petitioners' Brief at 14. Injunctive relief includes both prohibitory injunctions, which preserve the *status quo*, and mandatory injunctions, which disturb the *status quo* by ordering affirmative relief. *Johnson v. Kay*, 860 F.2d 529, 541 (2d Cir. 1988); 43 C.J.S. Injunctions § 7 ("an injunction is mandatory or [prohibitive] according to whether it directs a person to do a particular thing or to refrain from doing an act"); BLACK'S LAW DICTIONARY 784-85 (6th ed. 1990).

To "restrain" means to "prevent from doing" or to "limit, restrict, or keep under control." WEBSTER'S NEW COLLEGIATE DICTIONARY 979-80 (1979). The retrospective language contained in the citizen's suit provision authorizing a court to order restraint of "any person who *has contributed ... to the past* ... handling, storage, treatment, transportation, or disposal of any solid or hazardous waste" that presents an imminent and substantial endangerment to health or the environment, is expressly directed to *past* conduct. 42 U.S.C. § 6972(a)(1)(B) (emphasis added). An order issued with respect to such conduct would necessarily require

affirmative action to abate the endangerment because the person to whom such an order would be issued would no longer be doing anything that could be prohibited. Consequently, the authorization to "restrain" includes the power to issue a mandatory injunction ordering a responsible party to remediate the endangerment.

Accordingly, both prohibitory and mandatory relief is contemplated by the phrase, "... to restrain any person," and therefore the phrase, "... such other action as may be necessary," may not reasonably be interpreted, as Petitioners urge, Petitioners' Brief at 14, merely to restate the authorization of mandatory injunctive relief already provided by the former phrase. *See Porter v. Warner Holding Co.*, 328 U.S. 395, 399, 66 S.Ct. 1086, 1089 (1946); *Hecht Co. v. Bowles*, 321 U.S. 321, 328, 64 S.Ct. 587, 591 (1944) (authority to grant injunctive relief or "other order" contemplates a remedy other than an injunction, including equitable relief). Such redundancy is particularly unlikely to represent Congressional intent in light of the final words of the sentence, "or both." The inclusion of these words indicates unequivocally that the preceding phrases represent alternative remedies, and that neither constitutes a reiteration of the other. Rather, further relief is clearly authorized.

Contrary to Petitioners' arguments, Petitioners' Brief at 35, the Ninth Circuit has not created a new right of action by implication with its decision in this case; it has simply recognized an alternative remedy already provided by Congress.

2. The Purposes For Which RCRA Was Enacted Are Advanced By An Interpretation of the Citizen's Suit Provision Permitting Recovery of Remediation Expenditures.

When the language of a statute is ambiguous, a court must adopt the "most natural" interpretation of that provision. *Gwaltney of Smithfield, Ltd. v. Chesapeake Bay Foundation, Inc.*, 484 U.S. 49, 57, 108 S.Ct. 376, 381 (1987). As in all cases of statutory construction, the words of the statute must be interpreted in light of the purposes Congress sought to serve. *Chapman v. Houston Welfare Rights Org.*, 441 U.S. 600, 608, 99 S.Ct. 1905, 1911

(1979). Therefore, even if the language of RCRA's citizen's suit provision were ambiguous, its proper interpretation may be ascertained only by reference to the purposes for which RCRA and its citizen's suit provision were enacted.

One of RCRA's stated purposes is to "assur[e] that hazardous waste management practices are conducted in a manner which protects human health and the environment." 42 U.S.C. § 6902(a)(4). Hazardous waste disposed of in a manner that endangers health or the environment violates this policy, and must not be permitted to remain unabated. Further, Congress established in RCRA a national goal of protecting the public from the dangers associated with improper handling of hazardous wastes, by stating that:

> The Congress hereby declares it to be the national policy of the United States that, wherever feasible, the generation of hazardous waste is to be reduced or eliminated as expeditiously as possible. Wastes that are nevertheless generated should be treated, stored or disposed of so as to minimize the present and future threat to human health and the environment.

42 U.S.C. § 6902(b). This Honorable Court, too, has recognized that RCRA's goals are to encourage resource recovery and protect against contamination. *City of Chicago v. Environmental Defense Fund*, __ U.S. __, 114 S.Ct. 1588, 1594 (1994). Clearly, these goals are best and most fully achieved when hazardous waste constituting an imminent endangerment is remediated as quickly as possible.

The purposes for which RCRA was enacted are also furthered by an interpretation of the phrase "... such other action" to include restitution of remediation costs to a citizen's suit plaintiff by the parties responsible for the presence of the waste. Such an interpretation encourages innocent parties to remediate contaminated land voluntarily, secure in the knowledge that they will be repaid by those responsible. Landowners will be more willing to remediate imminent endangerments with respect to which

federal, state, and local environmental authorities have declined to take action, whether as a result of resource constraints or for other reasons, if the landowners can expect to recover their costs. Even more importantly, permitting such recovery speeds the process of abating the dangers presented by hazardous waste, because landowners may remediate immediately and then pursue restitution from the responsible parties. These benefits would be lost if the phrase were interpreted as authorizing only injunctive relief. Under the latter interpretation, the danger presented by the waste would continue to threaten the public health and the environment until responsible parties could be identified, sued, and mandated to remedy the problem.

Given RCRA's purpose of ameliorating the problems posed by the improper disposal of hazardous waste, and the fact that this purpose is best advanced by interpreting the statutory language to include the award of restitutionary relief, interpreting the citizen's suit provision, "... such other action as may be necessary," as authorizing recovery of remediation expenditures is the "most natural" reading of that passage.

3. Plaintiffs Are the Intended Beneficiaries of the Citizen's Suit Provision.

Petitioners argue that citizens' suits under RCRA are permissible only to supplement the regulatory role of the federal government as private "attorneys general" or "enforcers" of RCRA. Petition for Writ of Certiorari at 28, *Meghrig v. KFC Western, Inc.*, __ U.S. __ (19__) (No. 95-83) ("Petition for Writ"). This position is flatly contradicted by the language of RCRA's citizen's suit provision, which states that "any person may commence a civil action *on his own behalf* ...." 42 U.S.C. § 6972(a)(1)(B). While RCRA as it existed prior to 1984 permitted a private citizen to sue only to enforce an order or regulation, the addition of the language of Subsection 6972(a)(1)(B) unambiguously grants to private citizens a right of redress, and not merely a responsibility to be exercised charitably for the good of all humanity or not at all. Accordingly, private citizens may

benefit as a result of pursuing their claims under RCRA, to the extent of recouping their remediation expenses.

Furthermore, the word "necessary" in the phrase, "... such other action as may be necessary," refers to the citizen bringing the suit, as the phrase occurs in the section entitled "Citizens' Suits." 42 U.S.C. § 6972. The relief that may be awarded thereunder should be that which is necessary to citizen's suit plaintiffs, *i.e.*, that which is necessary to restore them to their original positions.

4. The Reasonableness of Remediation Expenditures Pursuant to RCRA Can Be Assessed Adequately.

Petitioners also argue that RCRA's lack of a mechanism for determining which of the remediation expenditures by plaintiffs are recoverable indicates that RCRA was not intended to be used as a cost recovery vehicle. Petitioners' Brief at 24. This position is untenable, because the determination whether expenditures are recoverable under RCRA can be made in the same manner as in any other area of the law, through the traditional means of assessing the recoverability of costs, including contradictory hearings, expert testimony, introduction of evidence as to the reasonableness of the expenditures, and the application of traditional principles such as mitigation of damages.

The citizen's suit plaintiff seeking restitution of environmental remediation expenditures is seeking an equitable remedy, as discussed *infra*, and therefore only "reasonable" or "fair" expenditures may be recovered thereunder. 27 AM. JUR. 2D Equity §23; 30A C.J.S. Equity §§ 94-95. Significant remedial activity has been undertaken throughout the United States in recent years, primarily as a result of the impact of CERCLA and RCRA, creating a large body of knowledge regarding the cost and character of appropriate remediation expenditures. Experts in remediation and remediation technology can opine on the basis of knowledge and experience as to the necessity or reasonableness of particular remediation procedures. Moreover, CERCLA's National Contingency Plan provides a valuable yardstick against which a finder of fact can measure the reasonableness of remediation undertaken pursuant to RCRA. The absence of a statutory scheme

within RCRA by which to determine whether remediation expenditures were proper is irrelevant to the propriety of permitting the recovery of such expenditures.

Finally, permitting RCRA citizen's suit claims with respect to underground storage tanks ("USTs") will not, as Petitioners allege, Petition for Writ at 17, remove such claims improperly and *en masse* from state to federal court. The RCRA citizen's suit provision authorizes recovery of remediation expenditures only with respect to "imminent endangerments," 42 U.S.C. § 6972(a)(1)(B), and therefore only suits in which there is an imminent endangerment can be shifted to federal court from state court. The federal courts will not be overwhelmed by remediation claims because only a fraction of hazardous waste sites present an imminent endangerment within the meaning of RCRA. Additionally, it must be remembered that RCRA causes of action *may* be sued upon in state court. More importantly, however, it would be inappropriate to interpret a statute in a particular manner purposefully to ensure that fewer citizens will be able make use of it, especially when the statute has a purpose as beneficial as the remediation of imminent endangerment to human health or the environment.

B. Equity Permits Restitution of Remediation Expenditures in the Context of a RCRA Citizen's Suit.

KFC may also obtain restitution of its remediation expenditures pursuant to the courts' broad, inherent authority in equity.

Equity is a system of jurisprudence that resolves disputes according to the dictates of justice, or fairness, rather than according to the strictly formulated rules of the common law. 27 AM. JUR. 2D Equity §§ 1, 121; BLACK'S LAW DICTIONARY 540 (6th ed. 1990). Equity applies when the law does not provide an adequate remedy, and proceeds flexibly, case-by-case and on a highly fact-specific basis, as fairness necessarily depends heavily upon the particular facts of a given situation. *See* 27 AM. JUR. 2D Equity §§ 2, 86-87; 30A C.J.S. Equity §§ 20, 94.

Equitable relief, in the form of equitable restitution of remediation expenditures, is available in the context of a RCRA citizen's suit action. The award of equitable restitution is properly awarded through the courts' inherent equitable power to do justice, as well as under the statutory language preserving the right to equitable relief pursuant to RCRA itself.

1. The Courts Have the Inherent Power to Apply the General Principles of Equity and to Provide Equitable Restitution.

Where there is statutory law, equity follows the law. 27 AM. JUR. 2D Equity § 123; 30A C.J.S. Equity § 118. Nevertheless, even when an area of substantive law is addressed by statute, the courts retain their inherent jurisdiction in equity unless the statute specifically restricts that jurisdiction. *Porter*, 328 U.S. at 398; 30A C.J.S. Equity § 6(c). Equity goes beyond the statute to provide the necessary remedy when the given legal procedure is inadequate, provided that it is just to do so. *Bollinger and Boyd Barge Services, Inc. v. Motor Vessel, Captain Claude Bass*, 576 F.2d 595, 597-98 (5th Cir. 1978); and *Morrissey v. Bologna*, 123 So.2d 537, 543 (Miss. 1960), *cert.* denied, 81 S.Ct. 1091. Equity will not suffer a wrong to be without a remedy. 27 AM. JUR. 2D Equity § 120; and 30A C.J.S. § 120.

The equitable remedy of restitution, or repayment for costs expended, is available when a person performs another's duty to the public, even without the other's knowledge or consent, when the former intends to charge the latter for the services, and the performance is necessary to the public safety. RESTATEMENT OF RESTITUTION §§ 114, 115 (1937). Restitution should be granted when good conscience demands it. *Hecht*, 321 U.S. at 326; *Blood v. Fleming*, 161 F.2d 292, 296 (10th Cir. 1947); 30A C.J.S. Equity § 93. Conscience demands that the party who causes harm should pay to remedy the damage. Accordingly, under the proper circumstances, equity will require that the party who is responsible for the creation of an imminent and substantial endangerment must remediate the hazardous waste causing the danger. Petitioners

admit that this result is proper in the context of a citizen's suit under RCRA. Petition for Writ at 11.

The next logical step, however, is to require the responsible party to repay the innocent citizen who actually undertook the remediation. There is no logical or functional difference between payment for remediation and repayment to an innocent third person who has paid for the remediation; the same result of requiring the person causing the harm to bear the expense of remediating the damage is obtained either way. Thus, restitution represents the fair and equitable resolution required by good conscience, and it is an appropriate equitable remedy under RCRA.

Repayment is simply shifting the burden of remediation back to the party who is ultimately responsible for the presence (and therefore the remediation) of the hazardous waste. Such restitution is more nearly akin to repayment of a debt than to payment of damages. Thus, in the present case, KFC seeks only repayment of a debt due as a result of KFC having paid for remediation that should have been paid by the Meghrigs (assuming for purposes of this case, as we must, that the factual allegations of KFC's Complaint are true).

Furthermore, courts go much further to provide relief in furtherance of the public interest than when purely private interests are involved. 27 AM. JUR. 2D Equity § 104. The compelling public interest in speedy remediation of hazardous waste is a critical consideration supporting the award of restitutionary relief in the present case.

2. The Language of RCRA Evidences the Availability of Equitable Restitution.

Two separate components of RCRA's citizen's suit provision evidence Congressional intent to allow courts to retain their traditional powers of equity with respect to citizen suits, and to provide the equitable relief that justice demands.

First, 42 U.S.C. § 6972(f) provides that:

> Nothing in this section [the citizen's suit provision] shall restrict any right which any person (or class of persons) may have under any statute or common law to seek enforcement of any standard or requirement relating to the management of solid waste or hazardous waste, or to seek any other relief (including relief against the Administrator or a State agency).

Subsection 6972(f) clearly leaves available to the courts the ability to provide "any other relief," including equitable relief. This language does not preclude the exercise of the court's equitable powers, but rather explicitly *preserves* such remedies.

Second, the passage describing the relief that may be awarded, "... such other action as may be necessary," 42 U.S.C. § 6972(a)(1)(B), is broad and open-ended. The citizen's suit provision indisputably confers the ability to award injunctive relief, an equitable remedy. *See Hecht*, 321 U.S. at 329. However, injunctions represent only one of the permissible forms of relief available in equity. Limiting the interpretation of this phrase to injunctive relief would be reading into the statute restrictions that do not exist. The statute does not limit the type of relief available, but instead specifically provides for authority to require responsible parties to take "other actions".

The Ninth Circuit's observation that KFC would be denied all right to recover its costs of remediation if RCRA is not construed to provide such relief, *KFC*, 49 F.3d at 524, is entitled to considerable weight. Petroleum and its fractions are unregulated under CERCLA and many state hazardous substance laws, including those of California and Louisiana. 42 U.S.C. § 9601(14); Cal.Health & Safety Code § 25317; La. R.S. 30:2271(4)(c). The hazardous waste in question in the present case was gasoline, a petroleum product, and therefore recovery may be difficult or impossible to obtain under CERCLA and analogous state laws.

Further, as the Ninth Circuit properly recognized, the tort remedies that are available to plaintiffs in KFC's position are largely inadequate, because of short statutes of limitation, difficulties of proof, and court delays. *KFC*, 49 F.3d at 523.

Moreover, negligence is nearly impossible to prove, given the historical standards for hazardous waste disposal, many of which are unsatisfactory according to modern disposal standards, and the difficulty of establishing the reasonableness of waste disposal methods decades in the past. Trespass and nuisance causes of action are useless in many or most of these cases because the hazardous waste was usually placed on the property by its owner at the time or by a person otherwise privileged to do so. As CERCLA does not apply to sites contaminated by hazardous waste comprised of petroleum or petroleum fractions, potentially including gasoline, regardless of the extent of the threat to human health or the environment posed thereby, such sites may be remediated only through RCRA. Thus, the need to encourage remediation of petroleum-derived hazardous waste through RCRA is particularly compelling.

As further noted by the Ninth Circuit, precluding recovery of remediation expenses under RCRA would deprive "the very citizens who most deserve the remedy, namely innocent citizens, like KFC," of the right to restitution of expenditures for compliance with the environmental laws with respect to environmental hazards that they did not create. *KFC*, 49 F.3d at 523. Instead, the persons who actually generated, transported, or disposed of the hazardous waste would be fully insulated from liability for their actions, and the entire cost of their actions would fall upon innocent parties. Restitution is available to prevent wrongdoers from shifting responsibility for the consequences of their actions onto innocent victims. *Wyandotte Transp. Co. v. United States*, 389 U.S. 191, 204, 88 S.Ct. 379, 387 (1967).

Equity demands fairness. Equity gives the courts the power to decide each case on its individual merits, and to avoid harsh results when broad and far-reaching rules of law are applied to a narrow set of facts. The manifest injustice caused by allowing the responsible party to escape liability while burdening the innocent party with all costs of remediation can be avoided by the reasonable application of the principles of equity to the specific facts of each RCRA case.

3. Reason Leads to the Logical Conclusion That Because the Equitable Defense of *Laches* Is Available, the Equitable Remedy of Restitution Must Also Be Available.

Petitioners argue that because RCRA contains no statute of limitations, it must not provide for a restitutionary remedy. The Ninth Circuit, however, recognized that *laches* would be available to limit the time within which a citizen could bring an action under RCRA. *KFC*, 49 F.3d at 522. Acknowledgment of the availability of the equitable defense necessarily requires acknowledgment of the availability of equitable remedies.

Laches is an equitable mechanism by which enforcement of a right is pretermitted wh[illegible] its exercise would unjustly cause injury to the defendant as a result of inexcusable delay or lack of diligence on the part of the person asserting the right. *Costello v. United States*, 305 U.S. 265, 282, 81 S.Ct. 534, 543 (1961); and 30A C.J.S. Equity §§ 129. Determining whether the doctrine of *laches* should bar a claim requires consideration of all of the circumstances of a particular case. *See Citizens and Landowners Against the Miles City/New Underwood Powerline v. Secretary, United States Department of Energy*, 683 F.2d 1171 (8th Cir. 1982); and *United States v. Reilly Tar and Chemical Co.*, 546 F.Supp. 1100 (D. Minn. 1982).

Petitioners contrast RCRA with CERCLA, in order to support their argument that only CERCLA provides for recovery of remediation costs. Petitioners' Brief at 23. CERCLA, unlike RCRA, expressly provides a statute of limitations for citizens' suits. Petitioners ignore the fact that CERCLA, as it was enacted in 1980, *also* lacked a specific statute of limitations with respect to recovery of remediation expenditures. For six years, CERCLA actions for cost reimbursement were not subject to a statute of limitations. Congress did not enact a statute of limitations for CERCLA until the Superfund Amendment and Reauthorization Act of 1986. Pub. L. No. 99-499, 100 Stat. 1613 (1986).

Several cases interpreting CERCLA as it existed prior to the 1986 amendment addressed the issue of whether a time limitation existed for cost recovery under CERCLA, and each

determined that the exercise of these rights was limited by *laches*. The court in *United States v. Mottolo*, 605 F.Supp. 898, 909 (D.N.H. 1985) held that, prior to its amendment, CERCLA contained no statute of limitations with respect to actions for recovery of remediation costs, but that the doctrine of *laches* would be applied instead because a cost reimbursement action under CERCLA is essentially equitable in nature. The court further held that the doctrine of *laches* does not apply to suits brought by a federal or state government in its sovereign capacity. *Id.* Thus, prior to the addition of a statute of limitations on cost recovery actions, there was *no* limit on the time within which a government could pursue cost recovery under CERCLA. *See also United States v. Dickerson*, 640 F.Supp. 448, 451 (D. Md. 1986) (adopting same); and *United States v. Conservation Chemical Company*, 619 F.Supp. 162, 213 (W.D. Mo. 1985). (adopting same).

Amicus respectfully asserts that the equitable defense of *laches* must be available under RCRA, as noted by the Ninth Circuit, *KFC*, 49 F.3d at 522. Amicus further asserts that, because the equitable defense is available to the benefit of defendants, the equitable right to restitution must be available to the plaintiff. The principles of equity do not permit advantage to accrue to either party to a dispute. *Bollinger*, 576 F.2d at 598. Equity must be equally available to all parties because "equity delights in doing justice completely, and not by halves." 27 AM. JUR. 2D Equity § 119; 30A C.J.S. Equity § 119. It would be unfair for the defendant to obtain the benefit of equitable defenses such as *laches* if plaintiffs are not similarly afforded the benefits of equity.

II. THE "IMMINENT AND SUBSTANTIAL ENDANGERMENT" MUST EXIST WHEN REMEDIATION IS INITIATED.

Petitioners interpret RCRA's authorization of citizens' suits for improper disposals of hazardous waste that "... may present an imminent and substantial endangerment" to require the danger to be imminent when suit is filed, rather than when remediation is commenced. This strained and restrictive interpretation ignores RCRA's express authorization of citizens' suits concerning past conduct, as well as the compelling public policy behind RCRA, as discussed *supra* at Section 1(A).

Petitioners' interpretation of RCRA would require abatement of an imminent endangerment to await, at a minimum, identification of the responsible parties, proper notice, and filing of suit. Meanwhile, the potential danger to public health and the environment would continue, and the harm threatened thereby might actually come to pass. As noted by the Eight Circuit in the context of the nearly identically-worded provision by which EPA can file suit with respect to an "imminent and substantial endangerment":

> We agree with the district court, however, that RCRA's "imminent and substantial endangerment" language does not require the EPA to file and prosecute its RCRA action *while* the endangerment exists. As the district court aptly noted, this would be an "absurd and unnecessary" requirement. The endangerment language is plainly intended by Congress to limit the reach of RCRA to sites where the potential for harm is great.... The purpose of [RCRA] is to 'give broad authority to the courts to grant all relief necessary to ensure complete protection of the public health and the environment' (citations omitted). The limitation urged by defendants [that the EPA must file suit under RCRA prior to undertaking remediation] would defeat this purpose.

United States v. Aceto Agricultural Chemicals Corp., 872 F.2d 1373, 1383 (8th Cir. 1989).

The absurdity of requiring private citizens to file suit prior to remediating hazardous waste sites is similarly apparent, as such a requirement would similarly defeat the compelling public policy behind RCRA, *i.e.*, the *immediate* remediation of imminent endangerment. The words "imminent endangerment" entail a real threat to human health or the environment, and the neutralization of such threats would be severely impeded if remediation were delayed by bureaucratic hurdles that are unnecessary under a reasonable reading of the statute.

Under Petitioners' interpretation of RCRA, those parties who act promptly to address dangerous contamination would be deprived of their remedy under RCRA, while the remedies of those who chose to do nothing, or to litigate rather than remediate, will be preserved. *See Bayless Investmt. & Trading Co. v. Chevron U.S.A.*, 39 E.R.C. (B.N.A.) 1428, 1432 (D.Ariz. 1994). The statute should be read to avoid such an inappropriate result. Petitioners' interpretation of the RCRA citizen's suit provision is neither the most natural reading nor the reading most conducive to fulfillment of RCRA's purpose, and therefore constitutes an impermissible curtailment of the relief available under RCRA.

III. RECOVERY OF REMEDIATION EXPENDITURES IS PROPER UNDER RCRA REGARDLESS OF THE APPLICABILITY OF CERCLA.

The Ninth Circuit stated in its opinion below that KFC "has no remedy under CERCLA because CERCLA's petroleum exclusion covers refined petroleum products such as gasoline and therefore bars a lawsuit to recover response costs occasioned by its release." *KFC*, 49 F.3d at 523 n.6. Petitioners and the Western States Petroleum Association ("WSPA") as Amicus Curiae, argue that recovery of remediation expenditures under RCRA is improper because permitting such relief would nullify CERCLA's petroleum exclusion. Petitioners' Brief at 25-26; Brief for the Western States Petroleum Association as Amicus Curiae in Support of Petitioners

at 17, *Meghrig v. KFC Western, Inc.*, __ U.S. __ (19__) (No. 95-83) ("WSPA Brief"). This argument is without merit.

RCRA and CERCLA were both enacted to address the problem of hazardous materials discharged into the environment, but they are independent statutory schemes. CERCLA does not preempt the field of remediation or recovery of remediation expenditures and CERCLA's applicability *vel non* is irrelevant to the existence of a cause of action under RCRA.

A. CERCLA Has Not Preempted the Fields of Remediation or Recovery of Remediation Expenditures.

This Honorable Court should not construe CERCLA's explicit provision for recovery of the costs of remediation from the parties ultimately responsible to preclude such recovery under RCRA. Admittedly, CERCLA is primarily a clean-up statute (it has been described as "overwhelmingly remedial" in nature, *U.S. v. Aceto Agricultural Chemicals Corp.*, 872 F.2d 1373, 1380 (8th Cir. 1989)), while RCRA is primarily a regulatory statute (it has been described as a "prospective cradle-to-grave regulatory regime governing the movement of hazardous waste in our society," *Id.* at 1377). Nevertheless, in light of RCRA's authorization for private citizens to pursue civil actions, recovery of the costs of remediation of such hazardous waste from those ultimately responsible is also appropriate under RCRA.

CERCLA explicitly states that "[t]his chapter [CERCLA] does not affect or otherwise impair the rights of any person under Federal, State, or common law," with certain exceptions not relevant here. 42 U.S.C. § 9659(h). Thus, CERCLA does not provide the *sole* means of redress relative to matters regulated thereunder. Although CERCLA is "the centerpiece of the federal hazardous substance cleanup and liability program", S. COOKE, THE LAW OF HAZARDOUS WASTE § 12.01(2) (1995), it is not the *only* piece. CERCLA's existence in no way alters the availability of other remedies under other statutes, including RCRA, the common law, or equity.

B. *CERCLA and RCRA Are Independent Statutes Which Apply to Different Classes of Hazardous Materials.*

The terms "hazardous waste" and "hazardous substance", to which RCRA and CERCLA apply respectively, are not coextensive; a material can meet the definition of one without satisfying the definition of the other. A "hazardous substance" is defined under CERCLA to include any material defined as a "hazardous waste" under RCRA, except petroleum or a fraction thereof, or natural or synthetic gas. 42 U.S.C. § 9601(14). Thus, only RCRA, and not CERCLA, applies to hazardous waste consisting of petroleum or petroleum fractions, and the exclusion of CERCLA does not bar application of RCRA. *Agricultural Excess & Surplus Ins. Co. v. A.B.D. Tank & Pump Co.*, 878 F.Supp. 1091, 1097 (E.D. Ill. 1995); *Craig Lyle Ltd. Partnership v. Land O'Lakes, Inc.*, 877 F.Supp. 476, 480-81 (D. Minn. 1995); and *Zands v. Nelson*, 779 F.Supp. 1254, 1263 (S.D. Cal. 1991). It would be unconscionable, as well as contrary to the language of RCRA, to proscribe regulation of hazardous waste on the grounds that RCRA cannot apply because CERCLA's petroleum exclusion precludes regulation under CERCLA. Such an interpretation would free petroleum and its fractions, including benzene, toluene, and xylene, from all environmental regulation, despite the threat to human health and the environment that such materials may pose.

C. *RCRA Contains No Exclusion Comparable in Scope or Substance to the CERCLA Petroleum Exclusion.*

CERCLA applies exclusively to "hazardous substances", which are defined to exclude "petroleum, including crude oil or any fraction thereof which is not otherwise listed or designated as a hazardous substance under subparagraphs (A) through (F) of this paragraph." 42 U.S.C. § 9601(14). This exclusion is commonly referred to as the "petroleum exclusion".

The United States Environmental Protection Agency ("EPA") has interpreted the CERCLA petroleum exclusion to apply

to materials such as crude oil and crude oil fractions, hazardous substances indigenous to petroleum, such as benzene, and indigenous, refinery-added hazardous substances that are normally mixed with or added to crude oil or crude oil fractions during the refining process. EPA General Counsel, *Scope of CERCLA Petroleum Exclusion Under Sections 101(14) and 104(a)(2)* 5 (July 31, 1987). EPA has stated that the petroleum exclusion does not apply to hazardous substances that are added to oil during use. *Id.* at 4, citing 50 Fed. Reg. 13,456 (April 4, 1985) and 51 Fed. Reg. 8,206 (March 10, 1986). The courts have largely followed EPA's interpretation of the petroleum exclusion. *E.g., Wilshire Westwood Associates v. Atlantic Richfield Corp.*, 881 F.2d 801, 810 (9th Cir. 1989); and *Niecko v. EMRO Marketing Co.*, 769 F.Supp. 973, 982 (E.D. Mich. 1991).

The limited legislative history regarding the petroleum exclusion is comprised primarily of concerns expressed by members of Congress about the lack of authority under the bill to respond to releases of petroleum. James Baller, *The Petroleum Exclusion - Stronger Than Ever After* Wilshire Westwood, 43 SOUTHWESTERN L.J. 915, 918 (1990). Typical of these concerns are the comments of Representative Mikulski of Maryland:

> I realize that it is disappointing to see no oil-related provision in the bill, but we must also realize that this is our only chance to get hazardous waste dump site cleanup legislation enacted. I would note that we have had assurances from Members of the Senate that an oilspill proposal would be considered a very high legislative priority in the 97th Congress.
>
> Moreover, there is already a mechanism in place that is designed to deal with spills in navigable waterways. There is not, however, any provision currently in our law that addresses the potentially ruinous situations of abandoned toxic waste dump sites.
>
> I, therefore, believe that it is very imperative that we pass the Senate bill as a very

> important beginning in our attempt to defuse the ticking environmental time bomb of abandoned toxic waste sites.

126 Cong. Rec. H11,976 (Dec. 3, 1980). Thus, the CERCLA petroleum exclusion was enacted as a compromise measure to ensure the passage of a stopgap bill to begin the process of regulating hazardous substances in circumstances, such as the absence of a responsible party, to which RCRA did not apply at the time. RCRA's authorization for citizen suits with respect to imminent endangerments was added in 1984, Pub.L. No. 98-616 (1984), four years after CERCLA was enacted, Pub.L. No. 96-510 (1980).

RCRA also contains a "petroleum exclusion" of sorts, but it is far more limited in scope than CERCLA's petroleum exclusion. Congress temporarily exempted from regulation under RCRA all "drilling fluids, produced waters, and other wastes associated with the exploration, development, or production of crude oil or natural gas", pending investigation by EPA as to whether regulation of these materials under RCRA was warranted. 42 U.S.C. § 6921(b)(2)(A), (B). This exemption is commonly referred to as the "Bentsen exemption." EPA eventually determined that regulation of these materials under RCRA was inappropriate, and the Bentsen exemption became a permanent part of RCRA.

The legislative history of the exemption indicates that it excludes from regulation only those wastes intimately associated with the exploration for and initial recovery of oil, and nothing more:

> The term "other wastes associated" is specifically included to designate waste materials intrinsically derived from primary field operations associated with the exploration, development, or production of crude oil, natural gas or geothermal energy. It would cover such substances as: Hydrocarbon bearing soil in and around related facilities; drill cuttings; and material (such as hydrocarbons,

> water, sand, and emulsion) produced from a well in conjunction with crude oil, natural gas or geothermal energy; and the accumulated material (such as hydrocarbons, water, sand, and emulsior) from production separators, fluid treating vessels, storage vessels, and production impoundments.
>
> The phrase "intrinsically derived from the primary field operations" is intended to differentiate exploration, development, and production operations from transportation (from the point of custody transfer or of production separation and dehydration) from manufacturing operations.

House Conf. Rep. No. 96-1444, Joint Explanatory Statement of the Committee of Conference, *reprinted in* 1980 U.S.C.C.A.N. 5019, 5031.

Subsequently, EPA expanded on the distinction between waste resulting from field operations and waste produced, stating that:

> wastes associated with such processes as oil refining and petrochemical-related manufacturing are not exempt because those processes are not an integral part of primary field operations.

EPA, EXECUTIVE SUMMARIES, REPORT TO CONGRESS: MANAGEMENT OF WASTES FROM THE EXPLORATION, DEVELOPMENT, AND PRODUCTION OF CRUDE OIL, NATURAL GAS, AND GEOTHERMAL ENERGY, Pt. 1, p. 7 n.1 (1987). Accordingly, the Bentsen exemption applies only to hazardous waste that is:

> associated with operations to locate or remove oil or gas from the ground or to remove impurities from such substances, and it must be intrinsic to and uniquely associated with oil and gas exploration, development or production operations (commonly referred to simply as exploration and

> production or E&P); the waste must not be generated by transportation or manufacturing operations.

EPA, *Clarification of the Regulatory Determination for Wastes from the Exploration Development and Production of Crude Oil, Natural Gas and Geothermal Energy*, 58 Fed. Reg. 15,284 (March 22, 1993).

Thus, the RCRA Bentsen exemption does not create a blanket exemption of all petroleum-related substances from RCRA's ambit. Rather, it is a narrow exemption, the purpose of which is merely to except from RCRA hazardous waste produced by oil and gas exploration and production activities.

The court of appeals below did not even discuss whether the leaded gasoline discharged onto the property falls within the Bentsen exemption, and the foregoing discussion of EPA's interpretation of the exemption renders it apparent that the exemption *does not* apply to leaded gasoline, a refined petroleum product that is well-removed from exploration and production activities.

The scope of the CERCLA petroleum exclusion is much more broad than that of the RCRA Bentsen exemption, in that it applies to all petroleum fractions, rather than merely to substances used for oil and gas exploration and development. Moreover, according to its plain meaning, as well as its interpretation by Congress and EPA, the Bentsen exemption does not encompass refined petroleum products, such as the leaded gasoline at issue in the present case, regardless of whether such products fall within the CERCLA petroleum exclusion.

D. Leaking Underground Gasoline Storage Tanks Are Regulated Pursuant to RCRA.

When Congress addressed the problem of leaking underground gasoline storage tanks in 1984, it did so not by amending CERCLA and its petroleum exclusion, but by amending RCRA explicitly to permit regulation of leaking USTs. 42 U.S.C. § 6991, *et seq.* ("Subtitle I"). *See* Robert N. Aguilez, *Refining*

CERCLA's Petroleum Exclusion, 7 TULANE ENV. L.J. 41, 64 (1993), citing *Amoco Oil Co. v. Borden, Inc.*, 889 F.2d 664, 667 (5th Cir. 1989). Thus, Congress has clearly indicated its willingness to regulate disposal of petroleum-derived substances through RCRA, regardless of the exclusion of these substances from CERCLA's regulatory scheme.

WSPA raises two issues with respect to USTs. First, WSPA implies that citizens cannot file suit under RCRA with respect to leakage of gasoline from USTs because gasoline is not "waste" within the meaning of RCRA. WSPA Brief at 11, citing 130 Cong. Rec. S2028, S2080 (daily ed., Feb. 29, 1984) (comments of Sen. Durenberger). Most courts that have examined the issue, however, have held that *leaked* gasoline *is* a waste material. *Agricultural Excess*, 878 F.Supp. at 1095; *Craig Lyle*, 877 F.Supp. at 482; and *Zands*, 779 F.Supp. at 1262. *C.f.*, *Winston v. Shell Oil*, 861 F.Supp. 713, 716 (C.D.Ill. 1984).

WSPA also notes that Subtitle I contains no cost recovery mechanism. WSPA Brief at 11. This point is irrelevant because Subtitle I is part of RCRA, and RCRA's citizen suit provision authorizes suit for any "imminent and substantial endangerment", as discussed *supra* at section I(A), including threats caused by violation of Subtitle I. 42 U.S.C. § 6972(a)(1)(B).

Accordingly, by providing for the regulation of USTs under Subtitle I of RCRA, Congress has clearly indicated that the CERCLA petroleum exclusion does not preclude regulation under RCRA of gasoline that has leaked from USTs, when an imminent endangerment to human health and the environment is presented thereby.

CONCLUSION

For the foregoing reasons, Amicus respectfully urges this Honorable Court to affirm the decision of the United States Court of Appeals for the Ninth Circuit recognizing that, under proper circumstances, the RCRA citizen's suit provision authorizes courts to order a party responsible for the disposal of hazardous waste which creates an imminent and substantial endangerment to health and the environment to repay an innocent party who has remediated the contamination in question.

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